Bruce A Timmons
May 17, 2016

The Honorable Kurt Heise, Chair, House Committee on Criminal Justice
Members of the House Committee on Criminal Justice

Re: **SB 332** (Jones) Liquor; drinking age; penalties for minor in possession (MIP); modify.
SB 333 (Jones) Traffic control; driver license; suspension of driver license after third minor in possession offense; provide for.

History: The current proposal to make the sanction for underage drinking a civil infraction is not a new idea. Déjà vu. Been there. Done that. That experiment didn't work out so well.

When the Legislature lowered the age of majority from age 21 to age 18 on January 1, 1972 (1971 PA 79), concerns about the consumption of alcoholic beverages at the younger age were raised during the debate on the legislation and continued throughout the 1970's. In November, 1978, voters approved a petition initiative to amend the Michigan Constitution to raise the drinking age from 18 to 21.

A bill was rushed through the lame duck Session of 1978 to make the sanction for underage drinking a civil fine only (instead of a misdemeanor that formerly had applied to underage drinking). In part, that fine-only legislation was patterned after the recent enactment of the traffic civil infraction system (1978 PA 510) that would not go into effect until August 1, 1979. [Yours truly was the principal staffer on PA 510 and was consulted by the drafter of the fine-only bill. The latter addressed only some of the procedural matters that PA 510 did.]

So, the civil fine only applied for over 15 years from 1978 (PA 531, I think, eff. something like 12/23/1978) for underage drinking until 1995.

Of all the complaints I heard over the first 25 years of the District Court's existence, the second biggest gripe of district judges from 1978 until mid-1990's was the civil fine sanction for Minor In Possession (MIP), a/k/a underage drinking. [#1 was the lack of county jail space for serious misdemeanors and drunk drivers who they thought deserved some time, jail space being consumed by pretrial detainees or felony sentences. Goes back to when it was still assumed that jails were for short-term stays for minor offenses and felons went to prison.]

District judges around the state complained that the civil fine sanction was ineffective and unenforceable. There was a substantial scoff-law problem. Many ticketed for underage drinking thumbed their nose at the citation and at the Court. There was low compliance – those cited did not show up or did not pay the civil fine in many instances. Judges typically would not issue bench warrants where a violator didn't show or didn't pay. It was a violation without a consequence. District judges were very frustrated with it and repeatedly said so.

By 1995 the Legislature had enough. In 1995 PA 122 (HB 4136) the Legislature restored the misdemeanor penalties to MCL 436.33b – later superseded by MCL 436.1703 in new Michigan Liquor Control Code of 1998. 1996 PA 492 (HB 5501) allowed the court to require participation in substance abuse prevention or substance abuse treatment and rehabilitation services for first offenses. There has been some softening of the penalty under MCL 436.1703. The Legislature has minimized the prospect that MIP violations will result in jail, but the possibility of jail for repeat violators means the offender is more likely to pay the fines, costs, and assessments.

Today MIP is a graduated penalty. MCL 436.1703 (which SB 332 amends) provides for a fine but no jail for a first offense (still a misdemeanor) but with opportunity for dismissal and no conviction upon compliance with set conditions; possible jail up to 30 days for a 2nd offense only if other factors like a probation violation occurred; and then up to 60 days for a 3rd offense only if factors like a probation violation occurred. But it also has consequences like substance abuse treatment, community service, alcohol screening, and suspension of one's driver's license for 90 days if the individual has a prior MIP, with a restricted license allowable after 30 days; or

suspension of one's driver's license for 1 year if the individual has 2 or more prior convictions for MIP, with a restricted license allowable after 30 days [MCL 257.319(7)(a) & (b)].

So What Would SB 332 (S-3), as Passed by the Senate, Do?
- Provide that a first violation of MIP (no prior judgment) would be a state civil infraction (SCI) but a second or subsequent violation would be/remain a misdemeanor.
- Include other alcohol or drug offenses like drunk or drugged driving or open intoxicants in vehicle as a "prior judgment" for purposes of determining if MIP is a second or later violation.
- Consistent with court decisions, allow police (with probable cause) to request (not require) a preliminary breath test, with test results admissible only if the individual consents to PBT.
- Limit court ordering a random or regular PBT to misdemeanor convictions (2nd violations).
- Limit the "discharge and dismissal" to the first misdemeanor offense (2nd violations).

Under SB 333(S-1) there would no longer be a driver's license (DL) suspension for a 2nd MIP violation but would continue to provide for 1-year DL suspension for MIP subsequent offenses.

Questions and Concerns about SB 332 and SB 333:

1. How do you prove a "prior" SCI violation? There is no SCI database - no central court, MSP, or SOS record for state civil infraction dispositions. SCI's are only reported to SOS if the defendant fails to appear or pay. Will the vast majority of "subsequent" violations in reality be only a first violation – especially if each SCI occurs in a different community?
2. Is the conduct criminal or civil? Other than the "prior" violation issue (which does not require proof beyond a reasonable doubt), there is absolutely no difference in the conduct or elements of the MIP "violation"/"offense" between 1st or a 2nd/5th violation. So how can the exact same conduct under the same law be both civil and criminal? Worse, equating civil infraction with criminal offense could endanger the entire traffic civil infraction system where we have consciously tried to separate CIs from misdemeanors in terminology and consequences. Note also that an SCI cannot be a lesser included offense for a crime. MCL 600.8827(1).
3. "Sentence enhancement" assumes a prior *criminal* conviction – with Miranda rights at time of arrest, appointed counsel if indigent, right to a jury trial, advice of rights in court before a plea, and proof beyond a reasonable doubt (plea or verdict). Those standards do not apply to an SCI. Can a charge of MIP 2nd violation based upon a prior MIP SCI be met with a collateral attack on whether the defendant had been advised by legal counsel before an admission of responsibility on the SCI or the lack of standards (like burden of proof) that apply to crimes?
4. "Civil infractions" are appropriate for minor law violations – a small fine payable at the court clerk's counter. Minimal consequence in exchange for no jury, lesser burden of proof, and no right to appointed counsel. Sanctions now allowed for MIP belie that this violation is "minor".
5. The SFA/HFA analyses miss financial consequences to the state. MIP as a misdemeanor requires payment of minimum costs of **$50** (MCL 769.1j) and the crime victim rights assessment of **$75** (MCL 780.905). As an SCI, the state will receive only a justice system assessment of **$10** (MCL 600.8827). SFA reports 9,300 MIP 1st violations in 2014; state loss would be **$1,069,500**.
6. The effective date is too short. The proposed changes require computer reprogramming by every district court site, SOS, and every prosecutor's and municipal attorney's office. If some communities need to change ordinances to be in compliance, that also takes time.

Please realize that "civil infractions" really depend to a large degree upon willing compliance by the violator. Even traffic civil infractions experienced a scoff-law/ non-compliance rate that exceeded one-third (I do not have current numbers), but the traffic civil infraction system has a consequential enforcement mechanism – suspension of one's driver's license. Most people do not want to be without their driver's license. However, state civil infractions, MCL 600.8827, have a much less onerous back-up system – non-issuance or non-renewal of a driver's license until the citation is resolved. Essentially there is minimal or no consequence to MIP violators until the 3rd violation (4th if 17-year-olds fall under family court jurisdiction) – assuming SCIs can be found and used to augment the sanction – and they will figure that out quicker than the police and prosecutors. They did so 25-30 years ago. Times change. But to paraphrase the old saw, if we fail to remember history, we may repeat it.